submitted that the real difficulty occasioned by these cases is the uncertainty introduced into the administration of estates, and that a statute embodying either rule would undoubtedly be welcomed by conscientious trustees.

RESTRICTIONS UPON THE VENDOR OF GOOD WILL. — It is sometimes held that the vendor of the good will of a business is under no special obligations with regard to it after the sale, aside from those fixed by the law of unfair competition, and may at once re-enter business on even terms.[1] But good will consists not merely of the chance of trade arising from the existence of the business as a going concern, distinct from the individual who carries it on, but also of the opportunities arising from the reputation of the proprietor.[2] This latter element, nearly always present, is often of the greatest importance,[3] and most courts endeavor to include it in such a sale. Though it is obvious that the good feeling of one man toward another cannot be transferred, yet the competitive power of the vendor, which if exercised would include the essence of this good will,[4] can be restricted or destroyed. And in Massachusetts a voluntary vendor is precluded from setting up a competitive business if it is found that it will impair the good will sold.[5] This, unfortunately, is not general law, and in the absence of an express provision in the contract of sale, most courts allow the vendor to re-enter the same trade.[6] A less severe restriction would be to prevent the vendor from dealing with the customers of the old business. Though this disregards the fact that good will is valuable because of the attraction of new patrons by the reputation of the business as well as because of the custom of the old ones, in the cases where it has been urged it has been overthrown as too broad a restriction.[7] The commonest limitation restricts the vendor only from soliciting the customers of the old business.[8] This seems to go too far or not far enough.

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annuity $2000 a year and the life tenant was 23 years old, Rule II would correctly give him a uniform income of about $2564. For on a four per cent basis such a life tenant's interest would be to the remainderman's as 71.8 is to 28.2. Rule I would give him about $3923 the first year, and less and less each year thereafter, for it treats each instalment of the annuity as if it were a separate and unexpected debt, falling suddenly upon the estate. It is to be observed that under neither rule is the age of the annuitant material.

[1] Williams *v.* Farrand, 88 Mich. 473; Cottrell *v.* Babcock Printing Press Co., 54 Conn. 122; Bergamini *v.* Bastian, 35 La. Ann. 60. See ALLEN, GOODWILL, 32.

[2] See Morgan *v.* Schuyler, 79 N. Y. 490, 493; Slack *v.* Suddoth, 102 Tenn. 375, 378; ALLEN, GOODWILL, 5, 42.

[3] Even in a mercantile business all the good will may be attached to the person. Brett *v.* Ebel, 29 N. Y. App. Div. 256.

[4] See STORY, PARTNERSHIP, § 99; 20 HARV. L. REV. 172.

[5] Old Corner Book Store *v.* Upham, 194 Mass. 101; Foss *v.* Roby, 195 Mass. 292. *Cf.* Townsend *v.* Hurst, 37 Miss. 679.

[6] Ranft *v.* Reimers, 200 Ill. 386; Zanturjian *v.* Boornazian, 25 R. I. 151. See Washburn *v.* Dosch, 68 Wis. 436, 439; Jackson *v.* Byrnes, 103 Tenn. 698, 700.

[7] The principal case; Leggott *v.* Barrett, 15 Ch. Div. 306.

[8] Trego *v.* Hunt, [1896] A. C. 7; Althen *v.* Vreeland, 36 Atl. 479 (N. J.); Ranft *v.* Reimers, *supra*. See Zanturjian *v.* Boornazian, *supra*. The vendor will be enjoined from soliciting even the trade of those old customers who have already begun dealing with him again, Curl Bros. Ltd. *v.* Webster, [1904] 1 Ch. 685; and from soliciting the correspondents as well as the customers of the old firm, Mogford *v.* Courtenay, 45 L. T. R. N. S. 303. See 9 HARV. L. REV. 479.

There is no consistency in allowing the vendor to enter into a competitive business then to bar him from the most effective means of success; to allow him to diminish the good will sold by advertising but not by solicitation.[9] Yet this restriction was recently enforced by the New York Court of Appeals in reversing the ruling of the Appellate Division.[10] *Von Bremen* v. *MacMonnies*, 200 N. Y. 41.

In theory these personal restrictions are usually considered as implied agreements by the vendor, not as incidents to the transfer of the property rights.[11] So when the transfer is involuntary, as through the trustee in bankruptcy, all courts leave the vendor as free as an outsider to re-engage in business.[12] But from the facts in the cases it appears that most courts have been inclined to lay down practically a rule of law that the restrictions discussed will or will not be "implied" in the voluntary sale of good will, thus making possible the classification above outlined. This error in practice has been caused in this country by following too closely the cases in England. It was there early established,[13] though since frequently regretted,[14] that the restraint which seems the most natural one, against establishing a competing business, could never be implied. Not free always to enforce the actual intent of the parties, the courts in their anxiety to protect the purchasers now apply their half-way measure with apparently undiscriminating regularity.[15] But the courts in this country, not bound by the English precedents, should have no such hard and fast rules to apply to the sale of so intangible and variable a thing as good will, and should endeavor to protect the purchaser to the full extent intended in each case and no further.

HABIT AS EVIDENCE OF AN ACT. — Habit, as evidence, shades off into (1) similar occurrences, (2) character, (3) custom, which may be regarded as a sort of composite habit of a group of persons. The distinctions between these topics can be made clear more easily by illustrations than by definitions. Suppose the issue to be whether X was intoxicated on a particular Saturday night. Evidence that he was seen to drink at some other particular time would be evidence of a similar occurrence. That he was temperate in all things would be evidence of character. That in his social set, banquets were invariably closed by drinking a toast to the King in whisky straight would be evidence of custom. That he spent his wages for liquor every Saturday night, or that he became intoxicated occasionally would be evidence of habit.

Habit may sometimes be shown to prove either what act a given person did, or what person did a given act. Evidence of handwriting

[9] See Williams *v.* Farrand, *supra.*

[10] *Accord*, Von Bremen *v.* MacMonnies, 138 N. Y. App. Div. 319. Similar recent New York decisions are: Kates *v.* Bok, 139 N. Y. App. Div. 640. *Contra*, Goetz *v.* Ries, 123 N. Y. Supp. 433.

[11] See Hutchinson *v.* Nay, 187 Mass. 262, 265; Ginesi *v.* Cooper, 14 Ch. Div. 596, 600.

[12] Hutchinson *v.* Nay, *supra;* Walker *v.* Mottram, 19 Ch. Div. 355. But the involuntary vendor is bound to refrain from unfair competition. Hudson *v.* Osborne, 39 L. J. Ch. N. S. 79.

[13] Cruttwell *v.* Lye, 17 Ves. 335. See Harrison *v.* Gardner, 2 Madd. 198, 219.

[14] See Harrison *v.* Gardner, *supra;* Trego *v.* Hunt, *supra.*

[15] Jennings *v.* Jennings, [1898] 1 Ch. 378; Gillingham *v.* Beddow, [1900] 2 Ch. 242; Curl Bros. Ltd. *v.* Webster, *supra.*